

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-6273-CR-HUCK/BROWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY TRENTACOSTA, et al.,

Defendants.

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GOVERNMENT'S RESPONSE TO DEFENDANT HERNANDEZ' MOTION
FOR DISCOVERY AND SUPPRESSION OF CO-CONSPIRATORS' STATEMENTS

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and files this response in opposition to the defendant Hernandez' Motion for Discovery and Suppression of Co-conspirator's Statements and Memorandum of Law (DE 187).

In his Motion, the defendant seeks discovery of "all reports, summaries, memoranda of interviews and statements of all persons who could be co-conspirators of the defendant," asserting that "[t]he statements of co-conspirators are discoverable under Rule 16, F.R.Cr.P., since they would be admissible against Defendant as if they were his own words ...," citing United States v. Thevis, 84 F.R.D. 47 (N.D.Ga. 1980). The defendant fails to advise this Court that the Eleventh Circuit has specifically and unequivocally rejected this argument, stating the following:

The appellants argue that they were entitled to receive the statements Ali [a co-conspirator] made to the government. They urge us to read Fed.R.Crim.P. 16(a)(1)(A) and Fed.R.Evid. 801(d)(2)(E) in *pari materia*. Combining these two rules, they reason that because the appellants could be held vicariously liable for statements made by conspirator Ali, Ali's statements would be essentially their own admissions.

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The Fourth Circuit had led the way on this issue, holding that defendants were entitled to discover coconspirator's statements under Rule 16(a)(1)(A). *United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir.), *cert. denied*, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985). However, the Fourth Circuit sitting *en banc* recently reconsidered that issue and concluded that Rule 16(a)(1)(A) was not intended to apply to coconspirators' statements. *United States v. Roberts*, 811 F.2d 257, 258 (4th Cir. 1987) (*en banc*); *see also United States v. Warren*, 772 F.2d 827, 837 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1214, 89 L.Ed.2d 326 (1986) (did not rule directly on the matter due to harmless error finding, but deemed the interpretation of Rule 16(a)(1)(A) a "novel claim"); 8 J. Moore, *Moore's Federal Practice*, 16.04(1) at 16-54 (2d ed. Nov. 1986 Rev.) (statements of coconspirators not available to defendant under Rule 16)

We agree with the Fourth Circuit that Rule 16(a)(1)(A) does not apply to coconspirator's statements.

United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987) (emphasis supplied).

WHEREFORE, the government respectfully requests that, in light of the aforesaid, the Court deny the defendant Hernandez' motion seeking discovery of co-conspirators' statements.¹

Respectfully submitted,

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¹Insofar as the defendant Hernandez' Motion also seeks a pretrial determination as to the admissibility of co-conspirator statements, he advances the same arguments as those presented in defendant Hernandez' Motion for a Pre-trial James Hearing (DE 184). To that extent, the government relies upon its previously filed Response to that Motion (DE 263).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S.

mail to the following on this 8th day of June 2001.

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